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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
Toll Free Service Access Codes) CC Docket No. 95-155

TO: The Chief,
Common Carrier Bureau
Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

EMERGENCY PETITION FOR SPECIAL RELIEF

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SUMMARY

The Petitioners seek an order directing Data Services Management, Inc. to modify the appropriate relocation database to render "unavailable" the toll free number 888-256-7766 and certain other limited subscriber numbers.

Prior to the adoption, by the Chief, Common Carrier Bureau, of the Report and Order, Mimeo No. DA 96-69, released January 25, 1996, the Petitioners made good faith efforts, consistent with the Commission's general directives, to assure that their previously-assigned 800 numbers would be included in the 888 replication database and would, as a result, be unavailable at least until the Commission could resolve various issues surrounding reservation of 888 numbers for "vanity" purposes. However, the Petitioners' efforts were thwarted, through no fault of their own, by the private organizations which, under the system endorsed by the Commission, was established for assuring such temporary unavailability of certain 888 numbers, including those held by parties in the Joint Petitioners' position.

If the requested relief is not granted, the Petitioners risk losing their ability to utilize the 888 numbers, since, absent the requested relief, the numbers may be placed in service by third parties. Such third parties may then proceed to trade upon the goodwill and business reputation created by the Petitioners in their 800 numbers, thus irreparably harming the Petitioners.

¹ Due to the rapidly approaching March 1, 1996 implementation deadline established by the Bureau for the deployment of 888 toll free access service, joint petitioners have no choice but to file their petition prior to the March 1st date. The joint petitioners note, however, that public notice of the release of the Bureau's R&O in this proceeding has not as yet commenced, since pursuant to the undersigned's knowledge (based upon review of Federal Registers published since January 25, 1996 and a call placed to the FCC's Clerk, Publications Office), there has been no publication of the R&O in the **Federal Register** and such publication is not expected for several days, well after the March 1, 1996 deadline. See 47 C.F.R. § 1.4(b)(1) (public notice of an order following notice and rulemaking commences with publication in the *Federal Register*). See also 47 C.F.R. § 103(a) (referenced by the Bureau in an ordering clause at ¶ 60 of its R&O as support for the effective date being established upon adoption of the R&O) which also provides that the designation of an earlier or later effective date shall have no effect on any pleading periods.

on March 1, 1996, directing Data Services Management, Inc. to mark on the appropriate replication database, thereby rendering "unavailable," toll free number 888-256-7766 and the limited subscriber numbers (less than 100) set forth at Attachment B1 and B2 of Exhibit 1 to this petition, deployment of the new 888 toll free access service authorized by the **R&O** will result in serious harm to joint petitioners, in direct violation of joint petitioners' procedural and substantive rights afforded them by the underlying policies of the Commission acting pursuant to delegated authority in the adoption and implementation of the 888 toll free service.²

BACKGROUND

In an apparent response to concerns that the availability of the numbers in the existing 800 toll free access service were rapidly being depleted, the Commission adopted a Notice of Proposed Rulemaking ("*NPRM*") on October 4, 1995 in *In The Matter of Toll Free Service Access Codes*, FCC No. 95-419, released October 5, 1995, ___ FCC Rcd. ___ (1995). The Commission stated that in light of this apparent situation, it believed it was necessary to "initiate a rulemaking proceeding through which we seek to assure that in the future, toll free numbers are **allocated on a fair, equitable and orderly basis**" (further emphasis added). *Id.*, slip op. at ¶ 1, p. 3. As pertinent here, in general, the Commission sought comment on proposals to: (1) promote the efficient use of

² Contemporaneously with the filing of this petition, joint petitioners will be filing a Emergency Motion for Stay, pursuant to § 1.43 of the Commission's Rules, 47 C.F.R. § 1.43.

toll free numbers; (2) foster the fair and equitable reservation and distribution of toll free numbers; (3) smooth the transition period preceding introduction of a new toll free code; (4) guard against warehousing of toll free numbers; and (5) determine how toll free vanity numbers should be treated. *R&O, slip op.* at 3 (¶ 4). Interested parties were directed to file Comments with the FCC on or before November 1, 1995 and Reply Comments on or before November 15, 1995. *NPRM, slip op.* at 35-36 (¶ 61). Because of the Commission's apparent desire to satisfy industry demand for the deployment of 888 service by March 1, 1996, the Commission, pursuant to delegated authority, adopted and released an *Order, Mimeo No. DA 95-2337*, on November 13, 1995, declining to extend the date of the condensed comment periods established by it so as not to "jeopardize the Commission's ability to establish rules for the national implementation of 888 as the next toll free service access code."³

As pertinent to the primary concerns of the joint petitioners, the Commission, *inter alia*, requested comments on several proposals (e.g., a right of first refusal, industry classification, etc.) which should be adopted in affording existing commercial 800 subscribers the right to protect their corresponding numbers in the proposed 888 toll free service. *NPRM, slip op.* at pp. 24-29. The

³ As it turns out, in light of a conservation plan adopted by the Bureau and implemented by the industry, 800 toll free numbers are available through June 1996, four months after the industry-motivated request for deployment of 888 toll free access code service on March 1, 1996 is scheduled to commence. See *R&O, slip op.* at 21 (¶ 35).

Commission recognized the interests of 800 subscribers in "having invested substantial resources in advertising the number and in establishing the reputation for it." *NPRM, slip op.* at pp. 24-25 (¶ 35) (wherein the Commission included examples of such vanity numbers as 1-800-THE-CARD and 1-800-FLOWERS). Various parties submitted comments, including petitioner Vanity International, who supported the replication of vanity numbers in the 888 toll free service. Comments of Vanity International filed on November 1, 1995.

An industry-based committee, SMS/800 Number Administration Committee, known as "SNAC," submitted a proposal to the Commission, to address the issue of replication. In its replication plan it informed the Commission that it had directed Responsible Organizations ("RespOrgs") to poll their respective 800 subscribers to determine which 800 subscribers wish to replicate in the 888 service. Once the vanity numbers were identified, SNAC directed that DSMI, the database manager for the current 800 toll free service, mark such numbers unavailable. Once the numbers were designated unavailable, the numbers would not be released for reservation at the time the rest of the 888 code is available for reservation. *R&O, slip op.* at pp. 15-16 (¶¶ 25-28). Based on SNAC's *ex parte* submission on January 18, 1996, the Commission estimated over 310,000 subscribers would be interested in replication of their numbers in the 800 service. *R&O, slip op.* at pp. 7-8 (13).

On January 25, 1996, a *R&O* in this proceeding was adopted and

released by the Commission's Common Carrier Bureau. Resolution of the instant proceeding had been delegated to the Bureau by the full Commission by *Order, Mimeo No. FCC 96-18*, adopted on January 24, 1996 and released January 25, 1996. Once again, in light of the Commission's belief that 800 service access codes may be depleted in the near future and the industry's previously anticipated deployment date of March 1, 1996, and in further consideration of the delay caused by the Commission furlough and snow emergency days, the Commission delegated the implementation of the 888 service to the Common Carrier Bureau, concluding that such delegation was the most efficient way to ensure that regulatory decisions necessary for the March 1, 1996 deployment would be made.

As pertinent herein, the Bureau's R&O adopted the SNAC Plan, modifying it to permit additional polling by the RespOrgs, while retaining the March 1, 1996 deployment date of 888 toll free access service. *R&O, slip op.* at pp. 2-3 (¶ 2) and pp. 33-34 (¶ 58). The Bureau further directed that "DSMI set aside those 888 numbers identified by the RespOrgs as a result of this polling process by placing these 'vanity numbers' in "unavailable" status until the Commission resolves whether these numbers ultimately should be afforded any permanent special rights or protection." *R&O, slip op.* at pp. 2-3 (¶ 2). Vanity numbers were defined by the R&O "to describe a number that a subscriber requests be made unavailable during the initial 888 reservation period." "A number designated "unavailable" in the SMS database is not available for assignment to any toll free subscriber." *Id.*, fns. 4, 5.

In direct response to petitioner Vanity International's express concerns that service providers/RespOrgs were not adequately polling smaller commercial subscribers like it, the Bureau modified the SNAC Plan, directing RespOrgs to continue the polling process, for a period of one week (January 26, 1996 until 11:59 p.m. on February 9, 1996), contacting commercial subscribers not previously polled. *R&O, slip op.* at p. 2 (¶ 2); p. 23 (¶ 38). The polling window, which occurred after the release of the Bureau's *R&O*, was the only polling period specifically directed by the Bureau in this proceeding. Once the window period closed on February 1, 1996 at 11:59 p.m., from February 2, 1996 until February 9, 1996, DSMI was given time to process all replication requests in the database. On February 10, 1996, at 12:01 a.m., an early reservation process went into effect, permitting RespOrgs to reserve available 888 numbers listed in the DSMI database. The early reservation process was established so that DSMI could phase in requests for new 888 service prior to the commencement of such service on March 1, 1996, without being overloaded.

Prior to Vanity International's *ex parte* comments on January 19, 1996, filed with the Commission the week before the Bureau's adoption of the *R&O* on the 25th of January, the Bureau was under the apparent assumption that all RespOrgs, as directed by SNAC, were actively engaged in polling their 800 subscribers. See e.g., Comments of the Service Management System/800 Number Administration Committee of the Order and Billing Forum filed with the FCC on November 1, 1995 (pp. 13-14) and the SNAC 888 Replication Plan

filed with the FCC on December 13, 1995, p. 1. Petitioner Vanity International, however, put the Commission directly on notice, that notwithstanding representations made to the Commission by SNAC and other commenters (see, e.g., LDDS' comments discussed at fn. 9 *infra*), that the RespOrgs were polling their commercial subscribers as directed by SNAC, to permit SNAC to process the information and inform the Commission of its results, many RespOrgs were not, in fact, contacting or polling their commercial 800 subscribers, especially smaller commercial subscribers. In direct response to Petitioner Vanity International's concerns, the Bureau directed that the polling process by RespOrgs of their previously unpolled commercial 800 subscribers continue for another week.

STANDING

Petitioner Vanity International is a vanity design and consulting firm, owned by Loren Stocker. See Declaration of Loren Stocker of Vanity International, Exhibit 1 attached hereto. Vanity International timely submitted Comments in response to the *NPRM*, in addition to the submission, on January 19, 1996, of a permissible *ex parte* filing. Since the adoption of the *R&O* on January 25, 1996, events have occurred which require petitioner to seek special relief from the Bureau before the scheduled commencement of the 888 access code on March 1, 1996 as directed by the *R&O*. As will be demonstrated, despite Vanity International being aware of the Commission's rulemaking proceeding and the *R&O* adopted and released by the Bureau on January 25, 1996, the *R&O*'s effective date, Mr. Stocker, acting on behalf of Vanity International and its

affiliated companies, was nonetheless frustrated in its efforts, following the release of the R&O, to seek replication of all commercial 800 numbers of Vanity International's affiliated companies. Mr. Stocker timely submitted replication requests to various RespOrgs within the brief one-week reservation deadline of January 26, 1996 through February 1, 1996, first announced by the Bureau in its R&O released on January 25th. The most notable roadblock faced by Vanity International in seeking replication protection consisted of arbitrary internal deadlines apparently adopted by certain RespOrgs (in Vanity International's case, AT&T), which unilaterally, and without prior notice to Vanity International, shortened the polling period that was established by the R&O. In adhering to its internal deadline rather than the Bureau's, RespOrg AT&T refused to accept Vanity International's requests for replication and refused to provide those requests to DSMI. See Exhibit 1 (declaration of Loren Stocker of Vanity International). These events arose after the Bureau's immediate adoption of the R&O and are being presented to the Bureau for immediate rectification.

Petitioner Genesis is a an Oregon corporation which owns and operates a cut flowers and gift delivery business under the name of 800-BLOSSOM. As indicated in the declaration of its President, Robert H. Tate (Exhibit 2 herein), Genesis first learned of the potential for an 888 service well after the deadline for the submission of Comments and Reply Comments in the NPRM. Genesis, which provides its cut flowers and gift business to customers on a

nationwide and international basis (and was not familiar with telecommunications issues heretofore), lacked actual knowledge relative to the Commission's *NPRM* and comment periods. Moreover, Genesis was never polled by its service provider and RespOrg, LDDS, as to whether Genesis desired to protect its 800-BLOSSOM number in the corresponding proposed 888 service, including during the subsequent window period established by the Commission in the *R&O* upon its adoption. See Declaration of Robert H. Tate, Exhibit 2 hereto, pp. 6-7 (at ¶ 10). Upon learning of the proposed 888 service in early December 1995, from a competitor to Genesis' service provider for 800-BLOSSOM, Mr. Tate made several calls over the period of early December 1995 through January of 1996, to various service providers, including LDDS, to ensure that its interest in protecting its corresponding 888 number be placed on the appropriate list or lists which he had become aware were being compiled by the service providers, including LDDS. Tate Declaration, Exhibit 2, pp. 1-5.

Notwithstanding Genesis' extensive efforts, the specific facts of which are set forth at Exhibit 2 herein, Genesis was also unfairly precluded from obtaining replication protection as provided in the Bureau's *R&O*. Consequently, joint petitioners, whose economic interests in protecting against assignment to other subscribers of any commercial 800 toll free number joint petitioners were entitled and timely sought to have replicated, are adversely affected by the Bureau's *R&O*, and entitled to seek special relief therein before the deployment of the new 888 toll

free service on March 1, 1996. See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

The Bureau must act on this emergency request before 12:01 a.m. on March 1, 1996 in light of the serious public interest questions which arise as a result of joint petitioners protection rights afforded under the R&O being ignored or dishonored by certain RespOrgs identified herein and joint petitioners having no choice but to seek replication protection through their respective RespOrgs rather than providing the necessary information directly to DSMI. See, e.g. R&O, slip op. at p. 2, fn. 3.

ARGUMENT

Absent immediate *ex parte* action by the Bureau as requested herein, the implementation of the R&O and 888 toll free service commencing March 1, 1996 will impermissibly deny joint petitioners' procedural and substantive rights in having "protected" various commercial toll free numbers, which the FCC has specifically determined are subject to being protected pending further decision by it within the year. R&O, slip op. at pp. 2-3, (¶ 2).

In what can only be described as an adult version of the game "keep away," certain participants in the 800 service provider industry, including certain RespOrgs, have impermissibly engaged in conduct resulting in current 800 commercial vanity number subscribers, like joint petitioners,⁴ from being afforded

⁴ According to the *NPRM*, "[a] vanity number is a telephone number for which the letters associated with the number's digits on a telephone handset spell a name or word of value to the number holder. Examples of such vanity numbers include "1-800-THE-CARD" and "1-800-FLOWERS." *NPRM*, slip op. at 24 (¶ 35). The *NPRM* also

"protection" in the form of replication of their respective 800 commercial toll free numbers in the proposed 888 toll free access code, pending further Commission action, as provided in the Bureau's R&O.

In adopting its R&O, the Bureau adopted the SNAC Plan as modified (e.g., to permit additional polling) for the deployment of new 888 toll free access service based on representations made in that Plan, which included that RespOrgs were directed by SNAC to poll their subscribers, report the information to SNAC, who in turn would inform the Commission as to the level of interest by current commercial subscribers to replicate their 800 numbers in the proposed 888 service. See, e.g., R&O, slip op. at pp. 2-3 (¶¶ 2), pp. 22-23 (¶¶ 37-38). It further adopted and seeks to implement the R&O in a manner it believes will satisfy the demand of the industry, which has consistently requested a March 1, 1996 deployment deadline, notwithstanding the significant lessening of need to meet the March 1, 1996 deadline in light of the Commission's conservation plan providing for the availability of 800 service numbers to the public through June 1996.

Prior to the adoption of the R&O, the Bureau was informed by petitioner Vanity International that RespOrgs were not polling their commercial 800 subscribers to determine the interest by those

determined that for purposes of the NPRM, "vanity numbers may also include any numbers in which the holders have a particular interest, be it economic, commercial or otherwise." *Id.* For purposes of the R&O, the term "vanity number" describes a number that a subscriber requests be made unavailable during the initial 888 reservation period. R&O, slip op. at p. 2, fn. 4.

customers in having such subscribers' numbers replicated. See *Ex Parte* Comments of Vanity International filed on January 19, 1996 and referenced at ¶¶ 33 and 37 of the R&O. In response, the Bureau directed the RespOrgs to continue polling, recognizing that the RespOrg was in the best position to make such inquiry. *Id.*, at (¶ 37). Unfortunately, as experienced by joint petitioners, certain RespOrgs, even after being informed that the R&O specified further polling of those commercial 800 subscribers not previously polled, failed to poll or notify their commercial 800 subscribers. See Exhibits 1 and 2 herein.

The impermissible action by certain RespOrgs, if not corrected by the Bureau before the March 1, 1996 deployment date, will result in substantial harm to joint petitioners. The commercial 800 numbers which joint petitioners timely requested be replicated, have already been reserved by other RespOrgs on behalf of other subscribers (e.g., Genesis' replication number 256-7766) and/or will be available to be placed in service on March 1, 1996. Joint Petitioners have been treated like "bouncing balls". First, they were not polled and informed by their RespOrgs of the proposed replication plan, matters essential to joint petitioners' business operations. Secondly, joint petitioners were excluded from placement on lists compiled by RespOrgs during internal compilation periods as well as during the Bureau established polling period, though requests were timely made by joint petitioners for such inclusion. Moreover, Genesis' requests to its assigned RespOrg LDDS and other RespOrgs for replication during the period of early

December 1995 through January 1996 were repeatedly denied, and each denial was followed with misleading information from the RespOrgs that the lists being compiled were for FCC informational purposes only and had no legal significance. When the Bureau's one week polling period was established in January, 1996, once again joint petitioners were not polled despite Bureau directive to continue polling commercial subscribers not previously polled (i.e., Genesis, Vanity International and no doubt others).

The "bouncing" continued when Vanity International timely sought replication during the Bureau's polling period, only to be cut-off by a RespOrg artificially imposing a deadline shorter than the Commission's permissible polling replication window, who then refused to seek replication with DSMI on behalf of petitioner Vanity International. In certain instances, Vanity International's timely requests were also not protected by other RespOrgs but for which Vanity International has no independent knowledge as to the reasons for such failures. Ultimately, all such activities impermissibly engaged in by certain RespOrgs resulted in joint petitioners being denied basic procedural and substantive rights under the R&O. Inaction by the Bureau to immediately investigate and correct the adverse consequences which continue to befall joint petitioners as a result of the unlawful activities of certain RespOrgs in connection with the implementation of the R&O, can only be viewed as tacit approval of the activities of certain RespOrgs by the Bureau, and such tacit approval is otherwise contrary to law. See *Administrative Procedure Act*, 5 U.S.C. § 706(1)(B).

In adopting the *NPRM*, statutory authority for the Commission to promulgate the proposed 888 access rules was set forth at ¶ 12. Section One of the *Communications Act* (the "*Act*") expressly requires the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." As the *NPRM* further noted, "Title II of the *Act* confers upon the Commission responsibility for regulating the activities engaged in the provision of common carrier services." *Id.*⁵ Given this statutory mandate, the Bureau must provide the relief joint petitioners seek prior to the March 1, 1996 deployment date based on the facts presented herein. The statutory mandate to the Commission clearly provides the Commission with authority to prevent any person including Mr. Tate and Mr. Stocker, from being forced to engage in what can only be described as "herculean" efforts to protect their interests afforded to them by the *R&O* but denied them by the unlawful activities of certain *RespOrgs*, whose activities the Commission exercises regulatory authority. See *CompTel Order, supra*, 8 FCC Rcd. at 1428.

The *R&O* afforded considerable deference to the *SNAC Plan* and the underlying assumptions that formed the basis of the *Plan* in its adoption of that *Plan*, as modified. However, the Bureau's *R&O*

⁵ Moreover, the Commission has regulatory authority with respect to access to the Service Management System (*SMS*) database by *RespOrgs* under Title II of the *Act*. See *In the Matter of Provision of Access for 800 Service*, 8 FCC Rcd. 1423, 1428 (¶ 28) (1993) ("*CompTel Order*") (wherein the Commission determined that such access by *RespOrgs* constitute provision of common carrier services).

provides no mechanism in which to resolve the dilemma impermissibly imposed on joint petitioners by the R&O. As Mr. Tate attests, the comments of the Commission's staff directed petitioner Genesis to contact DSMI for information concerning his dilemma.⁶ In seeking immediate resolution of the harm caused to Genesis, Mr. Tate contacted DSMI where he was told by DSMI, that absent Commission intervention directing DSMI to do so, DSMI would not alter the replication table. Genesis did seek Commission intervention (fn. 6 *supra*), but was informed by a staffperson that there was nothing the Commission could do! Mr. Tate was consistently told by the RespOrgs that they were only keeping FCC informational lists with no legal significance. When the RespOrgs were directed by the R&O to continue polling, joint petitioners were never contacted. See Exhibits 1 and 2 attached. And even where petitioner Vanity International attempted to be placed on the replication table during the Bureau established polling window, it was impermissibly cut-off by its RespOrg due to an internal imposed deadline shorter than the Bureau's window.

While the Commission may carefully consider comments by members of an industry intricately familiar with challenges being presented in establishing rules affecting the industry, and may

⁶ Relief from the intolerable situation Genesis found itself in was previously sought from Ms. Irene Flannery of the Common Carrier Bureau in the form of a letter from Genesis' Portland, Oregon attorneys on February 8, 1996 (a copy of the letter is attached as Appendix B to Mr. Tate's declaration (Exhibit 2)). In a follow-up call to the Commission on February 9, 1996, Genesis' Oregon counsel was informed by Bradley Wimmer of the Common Carrier Bureau, that there was nothing the Commission could do. Tate Declaration, Exhibit 2, p. 14 (¶ 27).

rely on the members of the industry to act responsibly in carrying out their duties to the public as mandated by the Commission and the Act, only the agency is afforded the authority to promulgate rules, and it must do so by reasoned decision-making. *Motor Vehicle Manufacturer's Association v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29 (1983). The Bureau, pursuant to delegated authority, adopted the R&O, affording replication protection to joint petitioners, while relying on RespOrgs, entities over whom the Commission has regulatory authority, to act responsibly in carrying out its duties as RespOrgs and common carriers. The actions of certain RespOrgs as described by joint petitioners herein were not remotely responsible. The deployment of the new 888 toll free access service under the R&O without implementing the relief requested by joint petitioners herein renders the decision of the Bureau beyond the bounds of reasoned-decisionmaking.

The Catch-22 situation which joint petitioners find themselves in despite affirmative efforts to avail themselves of the protection afforded in the R&O, is not only intolerable, it is contrary to the Commission's mandate in seeking to provide communications service to "all of the people of the United States" in an efficient, fair and orderly manner. The experiences of Vanity International and Genesis outlined in Exhibits 1 and 2 attached hereto, respectively, clearly belie the fulfillment of such mandate by the Commission. The Bureau must step in and protect joint petitioners where the RespOrgs have impermissibly failed to do so. .

The Commission's recognition of potential civil liability of those RespOrgs who have not acted responsibly does not solve the dilemma faced by Vanity International and Genesis. *R&O slip op.* at p. 22 (¶ 37). The scheduled deployment date of the new 888 access code is March 1st. Joint petitioners have done everything humanly possible and then some to resolve their unjustifiable predicament, including speaking to the FCC, the RespOrgs involved and DSMI. They have suffered enough and should not be required to suffer the irreparable harm which will result upon the Commission's proposed deployment of the 888 service without ensuring that the numbers which the joint petitioners sought to have replicated consistent with the *R&O* are placed on the DSMI database as "unavailable" and therefore "protected."⁷

⁷ Protection to commercial subscribers with vanity numbers like Genesis' 800-BLOSSOM even on an interim basis is a significant right, and the Bureau recognized this by its deferral of a final ruling on the subject pending further consideration. In affording the interim protection the Bureau intended to balance the interests of commercial subscribers like Genesis and Vanity International who have invested significant resources in their respective vanity numbers with the need to provide toll free service to the public. *R&O, slip op.* at (¶ 14). While joint petitioners believe that such protection should be afforded on a permanent basis, they will await further action by the Commission or its staff pursuant to delegated authority to provide further information in support of a final rule. The Bureau's *R&O* should not, however, have the clear, unintended effect of stripping Genesis and Vanity International from the protection they were required to be afforded by the *R&O*. This is especially so where the improper actions of Genesis' RespOrg in failing to replicate Genesis' 800-BLOSSOM number, a matter which could easily have been done, will result, absent immediate Bureau intervention, in the assignment of the corresponding 888 number to an entity whose agents have expressly represented intends to compete in the flower business, in order to take advantage of Genesis' 800-BLOSSOM business, damaging the commercial interests of Genesis and leading to confusion of the public. See fn. 8 *infra*.

Secondly, joint petitioners, already forced to incur significant time and expenses in numerous unsuccessful efforts at replication, see generally Exhibits 1 and 2 herein, have been forced to expend additional resources before the FCC with the filing of the instant emergency petition. Further resources may also have to be expended by joint petitioners if required to seek relief from the United States Court of Appeals should the Bureau decline or refuse joint petitioners the relief requested herein. With the impending deployment of the 888 toll free service on March 1st, the ability of joint petitioners in seeking monetary damages and/or injunctive relief from the unlawful actions of one or more RespOrgs in a court of competent jurisdiction is difficult if not impossible and will also unduly require further significant expenditures of time and money.

The reality is the Commission and its delegated authority have the regulatory power to rectify the intolerable situation joint petitioners find themselves in, which situation was caused by certain RespOrgs failing to protect the interests of subscribers like Genesis and Vanity International, by failing to poll and inform them of the new 888 toll free service in order to determine interest in replication and by excluding and refusing to honor timely requests by joint petitioners to be placed on replication lists. These failures have impermissibly resulted in the corresponding 888 numbers to be made available on a first-come, first serve basis for reservation and assignment by outside

parties.⁸ The Commission can and must exercise its regulatory authority over those RespOrgs, like LDDS, who have acted improperly and unlawfully in failing to perform their responsibilities as RespOrgs, including providing the Bureau with the mistaken impression that such RespOrgs adequately performed their responsibilities.⁹

⁸ With respect to the number 888-256-7766, the 888 number Genesis sought to replicate, the number has been secured by a RespOrg, whose anonymous client apparently intends to engage in a competing flower business, by taking advantage of customer confusion and misdials (See Tate Declaration, Exhibit 2 herein, pp. 17-18, ¶ 33), and the built-up goodwill of Genesis with respect to its corresponding 800-256-7766 (800-BLOSSOM) number utilized in its flower and gift business. This is precisely the conduct which the FCC sought to avoid in providing interim protection to a qualified subscriber like Genesis seeking replication. *R&O*, slip op. at 7 (¶ 12) and 33 (¶ 58) (recognition of commercial interest in 800 numbers which competitors may seek to undermine; interim protection provided for all equivalent 888 numbers currently designated by current commercial 800 subscribers by setting those numbers aside during the initial 888 reservation period). It is unclear at this time whether the unknown subscriber has sought assignment of the 888-256-7766 from reserve status.

⁹ Incredibly, LDDS has been intimately involved in the adoption and implementation of the Bureau's *R&O*, having submitted Comments and Reply Comments in response to the *NPRM*. Despite its involvement in the 888 toll free service rulemaking, including its support for the one-time replication of all 800 numbers provided such replication was fee-based (See Reply Comments of WorldCom, Inc. d/b/a LDDS WorldCom filed November 20, 1995 at p. 8), LDDS nonetheless failed to act as a responsible RespOrg. As indicated, Genesis was never polled by LDDS, its service provider and RespOrg, and despite repeated requests by Genesis to be added to a replication list compiled by LDDS, Genesis was consistently refused. See Tate Declaration, Exhibit 2, pp. 1-5).

LDDS' irresponsibility is not only evidenced by the deficiencies described herein, but is exacerbated by LDDS' course of conduct in misleading Genesis which made its replication requests known to LDDS, its service provider/RespOrg, on several occasions in December 1995 and January 1996. In each instance LDDS represented that the lists previously compiled by it were for FCC informational purposes only and had no force and effect as the FCC had not yet ruled. See Tate Declaration, Exhibit 2 herein, p. 4 (¶ 6)). Just prior to this time period, in November, 1995, LDDS

Absent the immediate issuance by the Bureau of an *ex parte* Order, issued prior to 12:01 a.m. on March 1, 1996, directing, *inter alia*, DSMI to mark as "unavailable" on the 888 toll free database, toll free number 888-256-7766, and all the commercial subscriber numbers requested by Vanity International and its affiliated companies at Attachment B1 and B2 to Exhibit 1 herein, until the Commission further addresses and issues its final rule concerning the protection to be afforded 800 vanity users with respect to 888 replication, these numbers will be subject to reservation and ultimate assignment to potential subscribers who have or will in the future, obtain use of these numbers, to the immediate detriment of Genesis and Vanity International, whose very protection rights the Bureau sought to respect in the adoption of the R&O. This result is contrary to the letter and spirit of the Bureau's R&O and must be rectified by the Bureau under the facts

affirmatively represented to the Commission in its Comments that it was aware of SNAC's study in attempting to develop "pertinent data" and that LDDS was "surveying its own 800 customers and [would] report back to the FCC via the ex parte process should [LDDS] garner an accurate reading of [LDDS'] subscribers' desires. Comments of WorldCom, Inc. d/b/a LDDS WorldCom filed with the FCC on November 1, 1995. As previously noted, Genesis was never polled by LDDS, even after the R&O adopted a further polling window, and Genesis was consistently refused placement on lists previously compiled by LDDS and other RespOrgs which lists were purportedly limited to FCC informational purposes. In checking the FCC's database in this proceeding, there is no record of LDDS submitting any further comments via the ex parte process and Genesis seriously doubts that such polling efforts were made based on its experiences with LDDS. This is so notwithstanding Genesis being informed for the first time on February 5, 1996 by an individual associated with LDDS that LDDS did have a replication schedule in place at time periods Genesis sought replication with LDDS (Tate Declaration, Exhibit 2, pp. 8-9. (¶ 14)), from which Genesis was impermissibly excluded.

presented herein.

RELIEF REQUESTED

The FCC is clearly authorized and must take immediate *ex parte*¹⁰ action, prior to the March 1, 1996 deployment date of 888 toll free service, directing DSMI to immediately mark as "unavailable" on the 888 toll free database, all joint petitioners' commercial 800 toll free numbers for which replication was not previously afforded joint petitioners despite timely requests made to the affected RespOrgs. To the extent required, the Bureau shall further direct all appropriate RespOrgs, *including but not limited to*, LDDS (Genesis' RespOrg), AT&T, Sprint and Allnet/Frontier (Vanity International affiliated companies' RespOrgs), and TWC Communications (the RespOrg who holds a reservation for an anonymous client who requested the 888 version of Genesis' 800-256-7766 number), who have reserved and/or assigned to a RespOrg or any third party, any of the affected 800 commercial toll free numbers for which joint petitioners attempted to seek replication and were denied, to unreserve and/or re-assign, all commercial 800 toll free subscriber numbers which have not been previously replicated or otherwise reserved by joint petitioners, for placement on the DSMI

¹⁰ *Ex parte* action by the Bureau pursuant to 47 C.F.R. § 1.45(e) is appropriate since replication protection currently afforded 800 commercial subscribers like joint petitioners is subject to the Bureau or the Commission's issuance of a final ruling within the year. Joint petitioners are seeking only that to which they are entitled under the Bureau's R&O and accordingly the Bureau has the discretion to take action *ex parte* in granting the relief requested by joint petitioners.'

replication list as "unavailable."¹¹

This action should also be taken immediately so that DSMI can inform appropriate RespOrgs that any subscriber who sought early reservation under the R&O's early reservation plan of the 888 numbers which petitioners previously requested be replicated prior to the early reservation period which commenced on February 10, 1996, can be provided with other numbers for immediate reservation or use. Since the early reservation plan was designed to avoid a last minute "gold rush" on the DSMI database on the scheduled deployment date of March 1st, the assignment of other available numbers in either 800 or the new 888 toll free service will not significantly harm the public or any other interested party. Moreover, the R&O continues to be subject to the timely filing of reconsideration or appeal, which time periods have not expired (see 47 C.F.R. §§ 1.103 and 1.4(b)). Accordingly, any party that has expended any resources, nominal or otherwise, in connection with the promotion of the new 888 toll free access numbers reserved or assigned during the early reservation period has taken such action at its own risk. See *Teleprompter Corp.*, 50 Rad. Reg. 2d (P&F) 125, 127 (CATV Bur. 1981); *Improvement Leasing Co.*, 73 F.C.C.2d

¹¹ The joint petitioners are seeking immediate relief as requested herein. As a separate matter down the line, the Bureau may also consider what action if any it should take in penalizing RespOrgs who have acted improperly, for example, by their failure to adequately poll all of their existing commercial subscribers, and their failure to honor timely requests made directly to the RespOrg by the subscriber for replication, including consideration of the imposition of an appropriate fine or monetary forfeiture, or more serious action such as decertification of an entity as a RespOrg. See, e.g., *NPRM*, slip op. at 23 (¶ 33).